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Jazlie bin Jaafar v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–79 AND 78–04 OF 2017(W)
AHMAD MAAROP PCA, ZAHARAH IBRAHIM CJ (MALAYA), RAMLY ALI, AZAHAR MOHAMED, ROHANA YUSUF, ABANG ISKANDAR AND NALLINI PATHMANATHAN FCJJ
20 NOVEMBER 2019
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Criminal Procedure — Trafficking in dangerous drugs — Presumption of trafficking — Trial judge invoked statutory presumption of trafficking against accused at close of prosecution's case — Whether trial judge wrong to have done so because prosecution did not prove accused had no authority under the Dangerous Drugs Act 1952 ('the DDA') or any other written law to be in possession of the drugs — Whether s 36 of the DDA did not require prosecution to prove accused's lack of authority — Whether prosecution only obliged to prove accused had possession of the drugs and that weight of the drugs triggered the presumption under law — Whether onus was on accused to prove he had authority to be in possession of the drugs — Dangerous Drugs Act 1952 s 37(da)

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The High Court found the appellant guilty of two charges of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and sentenced him to death. The Court of Appeal dismissed his appeal against the conviction and sentence. In his instant final attempt to set aside the conviction and sentence, the appellant relied upon a single ground — that at the close of the prosecution's case, the trial judge should not have invoked the presumption of trafficking against him under s 37(da) of the DDA. The appellant argued that the presumption could only be invoked if the prosecution had established not only that he had possession of the dangerous drugs and that their weight was sufficient to trigger the presumption under law, but that he also had no authority under the DDA or any other written law to be in possession of the drugs. The appellant said that as the prosecution failed to establish his lack of authority and the trial judge had also not made a finding on that aspect, the presumption of trafficking should not have been invoked. The prosecution replied that by virtue of s 36 of the DDA, it was not obliged to prove the appellant's lack of authority to be in possession of the drugs and that the onus was on the appellant to show that he had the authority. Section 36 provided that 'It shall not be necessary in any proceedings against any person for an offence against this Act to negative by evidence any licence, authorisation, authority or other matter of exception or defence, and the burden of proving any such matter shall be on the person seeking to avail himself thereof'.

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Held, unanimously dismissing the appeal and affirming the conviction and sentence:

(1) The offence of trafficking in dangerous drugs was provided for under s 39B of the DDA but that section did not stipulate what was, or amounted to, trafficking. Instead, under s 2 of the DDA, the elements of the offence of trafficking were: (a) the doing of any of the 18 acts specified in s 2; and (b) the doing of the act otherwise than under the authority of the DDA or the regulations made under the DDA. The prosecution had to adduce sufficient evidence to prove element (a). As for element (b), that was where s 36 of the DDA came into play. Section 36 embodied an exception to the fundamental rule of criminal law that the prosecution must prove all elements of the offence with which the accused was charged (see paras 14 & 28–29).

(2) The crucial question was whether prosecution for an offence of trafficking under s 39B(1)(a) of the DDA came within the ambit of the phrase 'any proceedings against any person for an offence against this Act' in s 36 of the DDA. The answer to that question must be in the affirmative. Thus, pursuant to s 36, and in the context of s 2 of the DDA, it was not necessary for the prosecution to adduce evidence to show the appellant's absence of authority under the DDA or the regulations made under the DDA, as the burden of proving that he had authority under the DDA or the regulations made thereunder was on the appellant (see para 29).

(3) What was necessary to invoke the presumption of 'trafficking' under s 37(da) in addition to proof of the relevant minimum weight of the dangerous drugs specified, was a finding of the accused being 'in possession' of the drugs and not a finding of being 'in possession otherwise than in accordance with the authority of the DDA or any other written law' since by virtue of s 36 of the DDA, it was not necessary for the prosecution to prove the element stated in the italicised phrase (see para 36).

(4) The trial judge did not err in invoking the presumption under s 37(da) of the DDA in respect of both the charges. There was no misdirection or appealable error on the trial judge's part and the convictions and sentences against the appellant on both the charges were safe (see para 37).

[Bahasa Malaysia summary

Mahkamah Tinggi mendapati perayu bersalah atas dua pertuduhan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan menjatuhkan hukuman mati kepadanya. Mahkamah Rayuan menolak rayuannya terhadap sabitan dan hukuman. Dalam percubaan terakhirnya untuk mengetepikan sabitan dan hukuman, perayu bergantung kepada satu

alasan — bahawa pada penutupan kes pendakwaan, hakim bicara tidak boleh menggunakan anggapan pengedaran terhadapnya di bawah s 37(da) ADB. Perayu berpendapat bahawa anggapan itu hanya boleh diguna pakai sekiranya pihak pendakwaan telah membuktikan bukan sahaja bahawa dia memiliki dadah berbahaya dan beratnya mencukupi untuk mencetuskan anggapan di bawah undang-undang, tetapi juga tidak mempunyai kuasa di bawah ADB atau mana-mana undang-undang bertulis lain untuk memiliki dadah. Perayu mengatakan bahawa oleh kerana pihak pendakwaan gagal membuktikan kekurangan kuasa dan hakim bicara juga tidak membuat keputusan mengenai aspek itu, anggapan pengedaran tidak sepatutnya dilaksanakan. Pihak pendakwaan menjawab bahawa berdasarkan s 36 ADB, ia tidak diwajibkan untuk membuktikan kekurangan kuasa perayu untuk memiliki dadah dan bahawa tanggungjawab adalah pada perayu untuk menunjukkan bahawa dia mempunyai kuasa. Seksyen 36 menyatakan bahawa 'Tidaklah perlu dalam apa-apa prosiding terhadap mana-mana orang atas suatu kesalahan terhadap Akta ini untuk menolak oleh keterangan apa-apa lesen, kebenaran, kuasa atau lain-lain perkara pengecualian atau pembelaan, dan beban membuktikan apa-apa perkara itu hendaklah kepada orang yang ingin mendapatkannya'.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Kesalahan pengedaran dadah berbahaya disediakan di bawah s 39B ADB tetapi seksyen itu tidak menetapkan apa yang telah, atau berjumlah, pemerdagangan. Sebaliknya, di bawah s 2 ADB, unsur-unsur kesalahan pemerdagangan adalah: (a) melakukan mana-mana daripada 18 perbuatan yang dinyatakan dalam s 2; dan (b) melakukan perbuatan selain daripada di bawah kuasa ADB atau peraturan yang dibuat di bawah ADB. Pihak pendakwaan perlu menambah keterangan yang mencukupi untuk membuktikan elemen (a). Bagi elemen (b), di mana s 36 ADB hadir. Seksyen 36 telah terkandung pengecualian kepada undang-undang jenayah asas bahawa pendakwaan mesti membuktikan semua elemen kesalahan yang dikenakan terhadap tertuduh (lihat perenggan 14 & 28–29).

(2) Persoalan penting ialah sama ada pendakwaan bagi kesalahan pemerdagangan di bawah s 39B(1)(a) ADB datang dalam istilah 'apa-apa prosiding terhadap mana-mana orang bagi kesalahan terhadap Akta ini' di dalam s 36 ADB. Jawapan kepada soalan itu mestilah dalam afirmatif. Oleh itu, menurut s 36, dan dalam konteks s 2 ADB, tidak perlu bagi pihak pendakwaan untuk menambah keterangan untuk menunjukkan ketiadaan kuasa perayu di bawah ADB atau peraturan yang dibuat di bawah ADB, sebagai beban membuktikan bahawa dia mempunyai kuasa di bawah ADB atau peraturan-peraturan yang dibuat di bawahnya adalah pada perayu (lihat perenggan 29).

(3) Apa yang perlu untuk menggunakan anggapan 'pemerdagangan' di bawah s 37(da) sebagai tambahan kepada bukti berat minimum yang relevan terhadap dadah berbahaya yang dikatakan, adalah suatu penemuan tertuduh sebagai 'memiliki' dadah dan bukannya suatu dapatan daripada menjadi 'dalam pemilikan selain daripada yang bertentangan dengan kuasa ADB atau mana-mana undang-undang bertulis lain' kerana menurut s 36 ADB, tidaklah perlu bagi pihak pendakwaan untuk membuktikan unsur yang dinyatakan dalam frasa yang huruf dicondongkan (lihat perenggan 36).

(4) Hakim bicara tidak terkhilaf dalam menggunakan anggapan di bawah s 37(da) ADB berkenaan dengan kedua-dua tuduhan itu. Tidak ada kesilapan atau kesilapan rayuan di bahagian hakim bicara dan sabitan dan hukuman terhadap perayu atas kedua-dua tuduhan itu adalah selamat (lihat perenggan 37).]

Cases referred to

Abdul Manap v PP [1952] 1 MLJ 140, CA (refd)
Jonaidi bin Mansor v PP [2002] 2 MLJ 111; [2002] 1 CLJ 761, CA (refd)
Lee Chin Hock v PP [1972] 2 MLJ 30, FC (refd)
McNaghten's Case [1843–60] All ER Rep 229; [1843] 10 CI & Fin 200, HL (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
PP v Abdul Rahim bin Kalandari Mustan [2008] 6 MLJ 161; [2008] 5 CLJ 108, FC (refd)
PP v Chin Yoke [1940] 1 MLJ 47 (refd)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685; [2005] 1 CLJ 713, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
R v Hunt [1987] 1 All ER 1; [1987] AC 352 (refd)
R v Turner [1814–23] All ER Rep 713; [1816] 5 M & S (refd)
Regina v Edwards [1974] 3 WLR 285, CA (refd)
Rex v Oliver [1944] KB 68, CA (refd)
Tan Ah Tee & Anor v PP [1980] 1 MLJ 49, CA (refd)
Tang Teck Seng & Anor v PP [2018] 4 MLJ 617; [2018] 1 LNS 35, CA (refd)
Williams v Russell [1933] 149 LT 190 (refd)
Woolmington v The Director of Public Prosecutions [1935] AC 462, HL (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 66, 78(1)
Criminal Procedure Code s 180, 180(4)
Dangerous Drugs Act 1952 ss 2, 4, 5, 6, 12, 19, 20, 36, 37(da), 39B, 39B(1)(a), (2)
Evidence Ordinance ss 105, 106
Internal Security Act 1960 ss 22, 25, 25(1), 57(1)

Licencing Act 1964 [UK] s 160(1)(a)
Misuse of Drugs Act 1973 [SG] s 3(a)

Appeal from: Criminal Appeal No W-05(M)-263–07 of 2016 (Court of Appeal, Putrajaya)

Hisyam Teh Poh Teik (Mary J Periera and Sukhaimi Mashud with him) (Teh Poh Teik & Co) for the appellant.
Mohd Dusuki bin Mokhtar (Tetralina bt Ahmad Fauzi with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Ahmad Maarop PCA:

[1] This judgment is prepared and delivered pursuant to s 78(1) of the Courts of Judicature Act 1964, as Justice Zaharah Ibrahim CJ (Malaya) (as she then was) and Justice Ramly Hj Ali FCJ (as he then was) have since retired. This judgment is the judgment of the remaining members of this panel.

[2] The appellant — Jazlie bin Jaafar ('Jazlie') was charged with two counts of trafficking in dangerous drugs; offences under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and punishable under s 39B(2) of the same Act as follows:

> (1) Pertuduhan Pertama
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> Bahawa kamu pada 11.03.2015 jam lebih kurang 3.30 petang di tepi jalan Jalan Lorong Kampung Bandar Dalam 6/2 dalam Daerah Wangsa Maju di dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu dadah Cannabis yang berat bersih adalah 1,013 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.
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> (2) Pertuduhan Kedua
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> Bahawa kamu pada 11.03.2015 jam lebih kurang 5.00 petang, di sebuah rumah alamat No R48, Jalan Umbun, Taman Setapak dalam Daerah Wangsa Maju di dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu dadah Cannabis yang berat bersih adalah 35,621.94 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[3] Jazlie was found guilty and convicted on both counts and was sentenced to death. His appeals to the Court of Appeal failed. The conviction and the death sentence in respect of each charge was affirmed by the Court of Appeal. He appealed to the Federal Court and hence these appeals before us.

THE PROSECUTION'S CASE

[4] The substance of the evidence adduced by the prosecution is as follows. On 11 March 2015 at about 12.30am, acting on information received relating to drug trafficking activities involving a Malay male, Insp Kumbai ak Tan ('SP9') led a team of police officers to a house No 2451, Wangsa Maju, Kuala Lumpur. Upon arrival at about 3pm, they conducted surveillance infront of the house. About 30 minutes later, a male Malay (identified in the trial as Jazlie) arrived on a Yamaha LC motorcycle and stopped beside the road as if waiting for someone. The police team pounced on Jazlie and arrested him. A bunch of five keys was seized from him. SP9 carried out a body search on Jazlie, and found a compressed slab wrapped in aluminium foil tucked infront of Jazlie's pants. This slab was certified by the chemist to be 1,013g of cannabis, a dangerous drugs under the DDA. This formed the subject matter of the first charge. Then, at about 4.30pm Jazlie led SP9 and the police team to his house at No R48, Jalan Umbun, Taman Setapak, Wangsa Maju. Using one of the keys which were seized earlier from Jazlie, SP9 unlocked the padlock at the gate of the fence of the house. Then, using another key from the same bunch of five keys, SP9 unlocked the padlock which was used to lock the grill door. Having gained entry into the house, using yet another key from the same bunch of five keys, SP9 unlocked Jazlie's room. SP9 found two plastic boxes in the room. The boxes were found to contain among others compressed slabs which were subsequently certified by the chemist to be cannabis weighing 35,621.94g. This formed the subject matter of the second charge.

JAZLIE'S DEFENCE

[5] Jazlie gave evidence on oath. His defence was that on 11 March 2015, one Ijoy telephoned him asking him to come to help him move house. Upon arrival, Jazlie went to the back of Ijoy's house where he was arrested. The police then asked Jazlie to lead them to his house. On the way, SP9 told him to call his family members to leave the house. According to Jazlie, in the house, he was asked to sit in the living hall while the police searched his room. Later, SP9 showed Jazlie the boxes taken from his room and informed Jazlie that the boxes contained compressed slabs suspected to be cannabis. Jazlie told SP9 that the boxes belonged to his friend Ijoy and that Ijoy had placed the boxes there while moving house.

JAZLIE'S SUBMISSION

[6] In attacking the conviction and sentence on him in these appeals Jazlie relied on only one ground — the learned trial judge erred when His Lordship invoked the presumption under s 37(da) of the DDA in respect of both charges. Opening his submission, learned counsel for Jazlie submitted that at the end of the prosecution's case, the learned trial judge invoked the

presumption under s 37(da) of the DDA against Jazlie and called upon him to enter on his defence. Learned counsel contended that the learned trial judge erred when he found that based on the prosecution's evidence, the presumption under s 37(da) had been triggered. This, learned counsel submitted, was because the prosecution failed to satisfy all the requirements under s 37(da) of the DDA. He submitted that in order to invoke the presumption under s 37(da), the prosecution has to establish, by evidence all the following elements:

(a) Jazlie was in possession of the drugs;

(b) the minimum weight of the dangerous drugs was sufficient to trigger the statutory presumption; and

(c) Jazlie did not have authority under the DDA or any other written law to be in possession of the drugs.

[7] In support of his submission, learned counsel relied on *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685; [2005] 1 CLJ 713 (FC) where in her separate judgment, Siti Norma Yaakob FCJ said:

> However to invoke the presumption of trafficking under sub-s (da) in order to establish a prima facie case of trafficking under s 39B(1) of the Act at the close of the prosecution case, all that needs to be introduced at the trial is sufficient evidence to establish:
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> (1) possession of the drug by the accused person, as understood in criminal law.
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> (2) the weight of the drug to bring it within the relevant minimum quantity specified by law,
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> (3) lack of authority on the part of the accused person.

[8] Learned counsel also cited in support *Public Prosecutor v Abdul Rahim bin Kalandari Mustan* [2008] 6 MLJ 161 at pp 172–173; [2008] 5 CLJ 108 at pp 121–122, where according to learned counsel, the aforesaid statement was reiterated. Thus, learned counsel contended that apart from proving possession and weight of the dangerous drugs, it is also the duty of the prosecution to adduce sufficient evidence that Jazlie did not have the required authority under the DDA or any other written law to be in possession of the proscribed drugs. Learned counsel also submitted that it is also therefore necessary for the learned trial judge to make a finding that there was no such authority. According to the learned counsel, the reason is simply this — since the prosecution is relying on the presumption under s 37(da) of the DDA, it is for them to prove that all the required elements are satisfied. Submitting further on this, learned counsel argued that there was no evidence from any of the prosecution's witnesses especially the investigation officer to say that Jazlie

had no such authority. Learned counsel submitted that in the absence of evidence in the prosecution's case on the lack of authority on the part of Jazlie to be in possession of the proscribed drugs, and in the absence of the necessary finding by learned trial judge on the lack of such authority, the requirements under s 37(da) had not been fulfilled and that therefore, the presumption under that section could not be invoked.

[9] Anticipating that the prosecution would rely on s 36 of the DDA in its reply to say that the prosecution has no burden to negative by evidence any authority in respect of s 37(da), learned counsel submitted that in its application, s 36 does not extend to s 37(da). He submitted that s 36 applies only to proceedings for an offence under the DDA which requires proper authorisation or licence. He argued that s 36 covers only offences provided under ss 4, 5, 6, 12, 19 and 20 of the DDA as those provisions require licence, permit, authorisation etc, and where any lack of them constitute punishable offences. Section 36 is not applicable to s 37(da) because the latter is a mere presumption where no offence or punishment is provided. Learned counsel submitted that by giving the words under s 36 its plain and ordinary meaning, the effect would be that it is to be applied to penal provisions, and not to presumption provisions. He contended that in any event, where there is a conflict in the construction of the wording of a statute, the interpretation in favour of the accused person is to be adopted by the court. *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 was cited in support of that submission.

THE PROSECUTION'S SUBMISSION

[10] The thrust of the submission in reply by the learned deputy public prosecutor ('DPP') is as follows. Even though pursuant to s 180(4) of the Criminal Procedure Code ('the CPC'), for the purpose of establishing a prima facie case against the accused the prosecution bears the burden of adducing credible evidence to prove each ingredient of the offence against the accused, s 36 of the DDA which is a specific provision in respect of offences under the DDA, overrides the application of s 180 of the CPC. By virtue of s 36 of the DDA, the onus of proving that the accused has a licence, or authority to be in possession of dangerous drugs is on the accused. Section 36 of the DDA is an exception to the fundamental rule that the prosecution must prove each element of the offence charged. *Regina v Edwards* [1974] 3 WLR 285, *Tan Ah Tee & Anor v Public Prosecutor* [1980] 1 MLJ 49, *R v Turner* [1814–23] All ER Rep 713, *Williams v Russell* [1933] 149 LT 190 and *Public Prosecutor v Chin Yoke* [1940] 1 MLJ 47 were cited in support of that submission. Thus, to invoke the presumption under s 37 (da) of the DDA, the prosecution has to prove, firstly, that the accused is found in possession of a dangerous drugs, and secondly, the minimum amount of the drugs specified under s 37(da) to trigger the presumption thereunder. The learned DPP submitted that the prosecution

does not have to prove lack of authority on the part of the accused to be in possession of the proscribed drugs. This, he contended was because of the application of s 36 of the DDA places the burden of proving licence, authorisation, authority, or other matter of exception or defence on the person seeking to avail himself thereof (ie the accused person).

DECISION OF THIS COURT

[11] The starting point is s 36 of the DDA. The question is whether s 36 of the DDA is applicable to a proceeding for an offence under s 39B of the DDA in which the prosecution is relying on 37(da) of the DDA. That is the issue which lies at the heart of these appeals.

[12] The learned DPP contended that s 36 of the DDA applies notwithstanding the use of the presumption under s 37(da) because prosecution for an offence under s 39B of the DDA is still within the ambit of the phrase 'any proceedings against any person for an offence against this Act', and thus there is no burden on the prosecution to prove the absence of licence or lack of authorisation or authority. He submitted that the burden of proving any such matter is on the accused. Learned counsel for Jazlie contended that s 36 of the DDA did not apply. To reiterate his argument, what he contended was that s 36 did not apply because the prosecution relied specifically on the presumption under s 37(da). He conceded that s 36 applies to proceedings for an offence under the DDA which requires authorisation or licence. Thus, he submitted that s 36 covers only offences under ss 4, 5, 6, 12, 19 and 20 of the DDA as those provisions require licence, permit, authorisation etc, and where any lack of them constitute punishable offence. Learned counsel contended that s 36 is not applicable to s 37(da) because the latter is a mere presumption where no offence or punishment is provided for. For reasons which we will explain in a moment we are unable to agree.

[13] In any proceedings against any person for an offence against the DDA, it shall not be necessary for the prosecution to negative by evidence any licence, authorisation, authority, or other matter of exception or defence. Instead, the burden of proving any such matter shall be on person seeking to avail himself thereof (ie the accused person). This is clear from s 36 of the DDA which provides as follows:

> 36 Burden of proof
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> It shall not be necessary *in any proceedings against any person for an offence against this Act* to negative by evidence any licence, authorization, authority, or other matter of exception or defence, and the burden of proving any such matter shall be on the person seeking to avail himself thereof.

[14] In our view, s 36 of the DDA embodies an exception to the fundamental rule of criminal law that the prosecution must prove all elements of the offence charged. In *Regina v Edwards* [1974] 3 WLR 285, the defendant was convicted of selling intoxicating liquor without a justices' licence contrary to s 160(1)(a) of the Licencing Act 1964 which provides:

> Subject to the provisions of this Act, if any person —
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> (a) sells or exposes for sale by retail any intoxicating liquor *without holding a justices' licence or canteen licence authorising* him to hold an excise licence for the sale of that liquor, or
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> (b) holding a justices' licence or a canteen licence sells or exposes for sale by retail any intoxicating liquor except at the place for which that licence authorizes him to hold an excise licence for the sale of that liquor,
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> he shall be guilty of an offence under this section.

The prosecution did not call any evidence to prove that the defendant did not have a licence. The main ground of the defendant's appeal was that the burden was on the prosecution to prove that the defendant did not have a licence. The Court of Appeal in England held that there was an exception to the fundamental rule of criminal law that the prosecution had to prove every element of the offence charged, which was limited to offences under enactments which prohibited the doing of an act but subject to provisoes or exemption. The Court of Appeal further held that if, on the true construction of an enactment, it prohibited the doing of a certain act, save in specified circumstances, it was not for the prosecution to prove a prima facie case of lack of excuse or qualification, for, the onus of proof shifted and it was for the accused person to prove that he is entitled to do the prohibited act. In this regard delivering the judgment of the court Lawton LJ said:

> In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved *an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged*. This exception, like so much else in the common law, was hammered out on the anvil of pleading. *It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities.* Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. *If the true construction is that the enactment prohibits the doing of acts, subject to provisoes, exemptions and the like, then the prosecution can rely upon the exception.*
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> In our judgment its application does not depend upon either the fact or the presumption, that the defendant has peculiar knowledge enabling him to prove the positive of any negative averment. As Wigmore pointed out in his great *Treatise on Evidence* (1905), Vol 4, page 3525, this concept of peculiar knowledge furnishes no

working rule. If it did, defendants would have to prove lack of intent. What does provide a working rule is what the common law evolved from a rule of pleading. We have striven to identify it in this judgment. Like nearly all rules it could be applied oppressively; but the courts have ample powers to curb and discourage oppressive prosecutors and do not hesitate to use them.

Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation upon an enactment being construed in a particular way, there is no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like; and secondly, what shifts is the onus: it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden.

[15] The burden of proof in relation to statutory exceptions came for consideration of the House of Lords again in *R v Hunt* [1987] 1 All ER 1; [1987] AC 352. The House of Lords considered a long line of authorities relevant to the subject including *Rex v Oliver* [1944] KB 68, *R v Turner* [1814–23] All ER Rep 713; [1816] 5 M & S and *Regina v Edwards* and held that that the burden of proving the guilt of an accused was on the prosecution save in the case of the defence of insanity and *subject to any statutory exception*; that such exception might be express or implied and the burden of proof might be placed on the accused whether the exception appeared in the same clause of the instrument in question as that creating the offence or in a subsequent proviso and whether the offence was triable summarily or on indictment and would be discharged on the balance of probabilities; and that where a linguistic construction did not indicate clearly on whom the burden of proof should lie the court might look to other considerations to determine the intention of Parliament such as the mischief at which the provision was aimed and practical considerations such as, in particular, the ease or difficulty for the respective parties of discharging the burden of proof. In *R v Hunt*, the appellant referred to the following passage in the speech of Viscount Sankey LC in *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at pp 481–482:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and *subject also to any statutory exception*.

The appellant argued that in using the phrase 'any statutory exception' Lord Sankey LC was referring to statutory exceptions in which Parliament had by the use of express words place the burden of proof on the accused, in the same way as the judges in *McNaghten's Case* [1843–60] All ER Rep 229; [1843] 10 CI & Fin 200, had expressly placed the burden of proving insanity upon the accused. In response to that argument, in his judgment, Lord Griffiths said:

I would summarise the position thus far by saying that *Woolmington* [1935] AC 462 *did not lay down a rule that the burden of proving a statutory defence only lay upon the defendant if the statute specifically so provided: that a statute can, on its true construction, place a burden of proof on the defendant although it does not do so expressly*: that if a burden of proof is placed on the defendant it is the same burden whether the case be tried summarily or on indictment, namely, a burden that has to be discharged on the balance of probabilities.

[16] Regarding the contention of the appellant that *Regina v Edwards* was wrongly decided by the Court of Appeal, Lord Griffiths held that *Regina v Edwards* was rightly decided except that His Lordship preferred to adopt the formula decided in *Regina v Edwards* as an excellent guide to construction rather than an exception to a rule, and that in the final analysis each case must turn upon the construction of the particular legislation to determine whether the defence is an exception. This is what His Lordship said:

In *Reg v Edwards* [1975] QB 27, 39–40 the Court of Appeal expressed their conclusion in the form of an exception to what they said was the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. They said that the exception:

> is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities.

I have little doubt that the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which do not fall within this formulation are likely to be exceedingly rare. But I find it difficult to fit *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107 into this formula, and *I would prefer to adopt the formula as an excellent guide to construction* rather than as an exception to a rule. *In the final analysis each case must turn upon the construction of the particular legislation to determine whether the defence is an exception* within the meaning of section 101 of the Act of 1980 which the Court of Appeal rightly decided reflects the rule for trials on indictment. *With this one qualification I regard Reg v Edwards as rightly decided*.

[17] Lord Ackner in a separate judgment said:

It is, of course, axiomatic that a statute *may impose upon the accused the burden of proof of a particular defence to a statutory offence and may do so either expressly or by necessary implication. Whichever method Parliament uses it has created a 'statutory exception' and there is no difference in the quality or status of such an exception. As at the date of the decision in Woolmington's case, there were numerous examples of statutes in which the onus of proof of a particular defence had been placed upon the accused, either expressly or, on a proper construction of the Act, by necessary implication*. There is no warrant to be found either in the words used by the Lord Chancellor quoted above or in their context for suggesting that 'statutory exception' is limited to express statutory exception. In *Mancini v Director of Public Prosecutions* [1942] AC 1, 11 Viscount Simon LC referred to Lord Sankey's second exception as covering no more

than 'offences where onus of proof is specially dealt with by statute'. *I take the word 'specially' to mean no more than that the onus of proof is made the subject of a statutory provision, be this express or implied*. Lord Simon was not purporting to narrow the exception identified by Lord Sankey, but merely to repeat it. If he had intended to narrow it to express statutory exceptions, this would have been so stated, but the resultant anomaly would then have required justification. Since, *ex hypothesi*, *Parliament had by necessary implication from the words used in the statute made known its intention, by what authority could that intention be ignored? It is a constitutional platitude to state that where Parliament makes its intention known, either expressly or by necessary implication, the courts must give effect to what Parliament has provided*. While the very nature of this appeal demonstrates the desirability of Parliamentary draftsmen, whenever it is the intention of Parliament to place a burden of proof upon the accused, so to provide in express terms, the proposition advanced by the appellant cannot be sustained.

[18] On the principle propounded by the Court of Appeal in *Regina v Edwards*, Lord Ackner remarked that the statement of principle in *Regina v Edwards* (referred to in para 14 of this judgment), is not intended to be exclusive in its effect, for, as stated by the Court of Appeal 'whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid'. This is what His Lordship said:

> My Lords, in giving my reasons for allowing this appeal, answering the certified question in the negative and quashing the conviction which are substantially the same as those of my noble and learned friend Lord Griffiths, I have made no mention of *Reg v Edwards* [1975] QB 27. I have not done so first because I agree with the Court of Appeal that this case does not fall within the principle stated at p 40 and secondly because *it is clear that the statement of principle is not intended to be exclusive in its effect. Lawton LJ in giving the judgment of the Court of Appeal stated in terms, at p 40:*
>
> > *Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid.*
>
> *Reg v Edwards* provides, to my mind, a most helpful approach — but it still leaves to be answered in every case where Parliament has made no express provision as to the incidence of the burden of proof the question 'what is the proper construction of the enactment?

[19] In our view the law is the same in this country. Statutory exception of similar nature are recognised and applicable (see *Abdul Manap v Public Prosecutor* [1952] 1 MLJ 140 (CA), *Lee Chin Hock v Public Prosecutor* [1972] 2 MLJ 30 (FC), *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (PC), *Jonaidi bin Mansor v Public Prosecutor* [2002] 2 MLJ 111; [2002] 1 CLJ 761, *Tang Teck Seng & Anor v Public Prosecutor* [2018] 4 MLJ 617; [2018] 1 LNS 35, *Public Prosecutor v Chin Yoke* [1940] 1 MLJ 47).

[20] In *Lee Chin Hock v Public Prosecutor* [1972] 2 MLJ 30, the following

question of law of public interest was reserved for the decision of the Federal Court under s 66 of the Court of Judicature Act 1964:

> In a prosecution for an offence under section 25(1) of the Internal Security Act No 18/60 whereby 'any person *who without lawful excuse has in his possession* any document or publication the possession of which is prohibited ...' do the words 'without lawful excuse' place the onus of such fact on the accused person or does it still lie with the prosecution?

[21] The background facts which led to the reference to the Federal Court are these. Where it appeared to the Minister of Home Affairs that any document and publication was of the kind mentioned in s 22 of the Internal Security Act, he may by order published in the *gazette* prohibit the printing, sale, issue, circulation or possession of that document or publication. The Minister made such an order in respect of a book entitled 'Advantages of Simplified Chinese Characters' published by the Hong Kong Publishing Trading Co at 46B Nathan Road, Hong Kong, which order was published in the *gazette* as PU(A) 380 dated 22 October 1970. The appellant had a bookshop at 13 Jalan Bunga Raya, Malacca. On 13 February, 1971, a police party visited it and found eight copies of this prohibited book, and accordingly the appellant was charged with in effect having, without lawful excuse, in his possession those books, though the charge did not expressly use the words 'without lawful excuse'. The charge alleged that the appellant had committed an offence punishable under s 25(1) of the Internal Security Act. Section 25 provides as follows:

> (1) Any person who *without lawful excuse has in his possession* any document or publication the possession of which is prohibited by an order under section 22, or any extract therefrom, shall be guilty of an offence against this Part and shall be liable in respect of a first offence under this section to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand dollars, or to both such imprisonment and fine and, in respect of a subsequent offence, to imprisonment for a term not exceeding two years.
>
> (2) In any proceedings against any person for an offence against this section such person shall be presumed, until the contrary is proved, to have known the contents and the nature of the contents of any document or publication immediately after such document or publication came into his possession.

[22] In the trial before the magistrates' court on the aforesaid charge the defence contended that on a charge for an offence under s 25(1) of the Internal Security Act 1960, what was punishable was not the possession of a publication prohibited by order made under s 22 of the Act but possession 'without lawful excuse' and further that the onus of proving absence of lawful excuse lay upon the prosecution. The omission of the underlined words, in counsel's

submission, was meant not to displace the burden resting on the prosecution to prove every ingredient in the charge including the absence of any lawful excuse. He argued that if the Legislature had intended to do so, it would have adopted the form of drafting s 25(1) as that in s 57(1). Section 57(1) of the ISA provides:

> (1) Any person who without lawful excuse, the onus of proving which shall be on such person, in any security area carries or has in his possession or under his control —
>
> (a) any fire-arm without lawful authority therefor; or
>
> (b) any ammunition or explosive without lawful authority therefor,
>
> shall be guilty of an offence against this Part and be punished with death.

[23] The magistrate agreed with the defence contention and acquitted and discharged the accused. In a revision, the High Court remitted the case to the magistrate with a direction to call for the defence of the accused. The Federal Court affirmed that order of the High Court. The Federal Court held that the appellant was accused of an offence of having in his possession prohibited documents without lawful excuse. If he had a lawful excuse, that fact would be especially within his knowledge. Section 106 of the Evidence Ordinance in the clearest language provides that the burden of proving that fact is on the appellant. It follows therefore that it is not for the prosecution to prove the absence of lawful excuse. The Federal Court also opined that s 105 of the Evidence Ordinance also was relevant. The presence of lawful excuse brings the case of the appellant within an exception in s 25(1) of the Act, the law defining the defence. By that section, the burden of proving that circumstance is upon the appellant and the court shall presume the absence of such circumstance. In delivering the judgment of the court, Ong Hock Sim FJ said:

> In the absence of a definition of 'lawful excuse', it is open to the accused to tender any sort of excuse, however fanciful or flimsy, the legality or sufficiency of which is to be determined by the court. This is peculiarly within the knowledge of the person charged and s 106 of the Evidence Ordinance earlier referred to clearly applies. Three cases need only be mentioned to show that the question had already been resolved in our courts. They are:
>
> (1) *Busu v Public Prosecutor* [1948–49] MLJ Supp 140 (CA) — a case under reg 4(1) of the Emergency Regulations 1948; Willan CJ. said there were three ways for a person not of the class or category mentioned in reg 4(2) to escape liability, namely, to show: (a) he had a licence; or (b) he was an authorised person; or (c) an exempted person. He went on to say:
>
> > If, therefore, it is necessary for the prosecution to call prima facie evidence that an accused had no licence, equally it must be necessary for them to call prima facie evidence regarding (b) and (c) above.
> >
> > For the prosecution to adduce prima facie evidence regarding (a), (b) and (c)

above would place an onus on them of giving negative proof regarding lack of qualifications, when in fact the existence of those qualifications is especially within the knowledge of the accused.

(2) *Abdul Manap v Public Prosecutor* [1952] 1 MLJ 140 (CA) — *it was held that it is not an essential part of the case for the prosecution to prove the absence of lawful authority (call it 'excuse' in the instant case) and that the onus of the negative averment was on the accused to prove he had lawful authority*. Spenser Wilkinson J delivering the judgment of the court quoted with approval a passage from the judgment of Talbot J in *Williams v Russell* 141 LTR 190 at p 191:

> ... *Where it is an offence to do an act without lawful authority, the person who sets up lawful authority must prove it and the prosecution need not prove the absence of lawful authority*.

(3) *Public Prosecutor v Lim Kwai Thean* [1959] 1 MLJ 179 at p 180 — a case under the Emergency (Registration Areas) Regulations 1948 involving onus to establish whether person is or is not required to be registered. We quote this time from Good J acting in revision:

> At the trial, Mr Yeo, counsel for the accused, submitted that the onus lay upon the prosecution to establish affirmatively that the accused was a person required to be registered under the Regulations and submitted that as no such proof had been given by the prosecution, there was no case for the accused to answer. The learned Magistrate accepted that submission and acquitted the accused without calling upon him for his defence ... There is only one point in these proceedings, and that is the point which was the subject matter of Mr Yeo's submission at the trial. The question is: Where does the onus of proof lie in order to establish that a person is, or is not, as the case may be, a person required to be registered under these Regulations? ... Does the onus lie upon the prosecution to prove that any particular person who fails or refuses to produce an identity card on demand by a Police Officer is not a member of one of the excepted categories, or does the onus lie upon the person concerned to prove that he is an excepted person? In my opinion, the effect of section 106 of the Evidence Ordinance is quite clear: 'When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him,' and then follows the very well-known illustration (b) — the railway ticket illustration. To interpret that section properly, I think it is essential to concentrate upon what was meant by the word 'especially'. It does not say ' 'exclusively,' or 'solely,' within the knowledge of any person'. And, as I see it, the effect of the word 'especially' is this: That if it is an easy matter for the person concerned to prove a fact the proof of which by the prosecution would present the prosecution with inordinate difficulties, then ordinary common sense demands that the balance of convenience should be in favour of the prosecution.

It would appear that all these three decisions were based on the application of s 106 of the Evidence Ordinance.

Here the appellant was accused of an offence of having in his possession prohibited documents without lawful excuse. If he had a lawful excuse, that fact would be

especially within his knowledge. Section 106 in the clearest language provides that the burden of proving that fact is on the appellant. It follows therefore that it is not for the prosecution to prove the absence of lawful excuse.

In our opinion s 105 of the Evidence Ordinance also is relevant. *The presence of lawful excuse brings the case of the appellant within an exception in s 25(1) of the Act, the law defining the defence. By that section, the burden of proving that circumstance is upon the appellant* and the court shall presume the absence of such circumstance.

[24] On the defence contention that if the legislature had intended that under s 25(1) the prosecution did not have burden to prove absence of any lawful excuse, in drafting s 25(1), the legislature would have adopted the form of drafting as that under s 57(1), the Federal Court held that:

We are of the opinion that the fact that s 57 of the Internal Security Act by express words places the onus of proving the presence of lawful excuse on a person charged with having in his possession without lawful excuse fire-arms, etc, does not affect the answer to the question posed in this reference, because in our view those express words were put in by the Legislature *ex abundanti cautela*.

[25] The application of the principle enunciated in *Regina v Edwards* is demonstrated in the decision of the Singapore Court of Appeal in *Tan Ah Tee & Anor v Public Prosecutor* [1980] 1 MLJ 49. The two appellants in that case were charged jointly with an offence of trafficking in 459.3g of diamorphine, an offence under s 3(a) of the Singapore Misuse of Drugs Act 1973 which provides:

3 *Except as authorised by this Act or the regulations made thereunder*, it shall be an offence for a person, on his own behalf or on behalf of any other person, whether or not such person is in Singapore to —

(a) traffic in a controlled drug.

The expression 'controlled drug' is defined in section 2 thus: —

'Controlled drug' means any substance or product which is for the time being specified in Part I, II or III of the First Schedule to this Act or anything that contains any such substance or product;

[26] On behalf of the appellant, it was contended that the prosecution had failed to prove an essential element of the offence with which they were charged in that there was no evidence before the court that the appellant were persons who were not authorised by the Misuse of Drugs Act 1973 or the regulations made thereunder to traffic in diamorphine, a controlled drug. Wee Chong Jin CJ delivering the judgment of the court held:

It is a fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This is a common law rule which is not embodied in any legislative enactment but is English in origin. In England the Court of Appeal

in *R v Edwards* [1974] 3 WLR 285 held that if an enactment under which a charge is laid, on its true construction, prohibits the doing of acts, subject to provisoes, exemptions and the like, then the prosecution can rely upon the exception to the fundamental rule of the common law of England that the prosecution must prove every element of the offence charged. The Court of Appeal so held after a thorough analysis of a long line of authorities beginning from *R v Stone* (1801) 1 East 639. We quote below the judgment of the court in *R v Edwards*, delivered by Lawton LJ at pp 295–6:

> In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisoes, exemptions and the like, then the prosecution can rely upon the exception.
>
> In our judgment its application does not depend upon either the fact or the presumption, that the defendant has peculiar knowledge enabling him to prove the positive of any negative averment. As Wigmore pointed out in his great *Treatise on Evidence* (1905), Vol 4, p 3525, this concept of peculiar knowledge furnishes no working rule. If it did, defendants would have to prove lack of intent. What does provide a working rule is what the common law evolved from a rule of pleading. We have striven to identify it in this judgment. Like nearly all rules it could be applied oppressively; but the courts have ample powers to curb and discourage oppressive prosecutors and do not hesitate to use them.
>
> Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation upon an enactment being construed in a particular way, there is no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like; and secondly, what shifts is the onus: it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden.

In our opinion the law here is the same as the law in England as to when the prosecution can rely on the exception. It is limited to offences arising under enactments which on their true construction, prohibit the doing of an act save in specified circumstances or by persons of specified classes or with special qualifications or with the licence or permission of specified authorities.

What then is the true construction of s 3 of the Act? *In our opinion the section prohibits trafficking in a controlled drug save in the circumstances specified therein ie save as authorised by the Act itself or the regulations made thereunder. Consequently, the prosecution was under no necessity to prove a prima facie case of lack of authorisation*

and it was for each appellant to prove that he or she was authorised to do the prohibited act.

[27] In our view, similarly, the law in this country as to when the prosecution can rely on the exception is the same as in England. As explained in *Regina v Edwards*, it is limited to offences arising under Enactment which on their true construction, prohibit the doing of acts, save in specified circumstances or by persons of specified classes or with specified qualifications or with licence or permission of specified authorities. But that statement of principle is not intended to be exclusive in its effect. As the Court of Appeal held in *Regina v Edwards* 'whenever the prosecution seek to rely on this exception, the Court must construe the enactment under which the charge it laid'. The question is what is the true construction of s 39B of the DDA?

[28] The offence of trafficking in dangerous drug is provided for under s 39B as follows:

> Section 39B Trafficking in dangerous drug.
>
> (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia —
>
> (a) traffic in a dangerous drug;
>
> (b) offer to traffic in a dangerous drug; or
>
> (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.
>
> (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than fifteen strokes.

[29] Section 39B does not stipulate what is or what amounts to trafficking. Instead, under s 2 of the DDA:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act;

So, under s 2 the elements of the offence of trafficking, an offence under s 39B(1)(a) of the DDA punishable under s 39B(2) of the DDA are

(a) the doing of any of the 18 acts specified under s 2; and

(b) the doing of the act otherwise than under the authority of the DDA or the regulations made under the Act.

The prosecution must adduce sufficient evidence to prove element (a). As for element (b), this is where s 36 of the DDA comes into play. It embodies a *statutory exception* expressly enacted by the Legislature. The crucial question here is whether prosecution for an offence of trafficking under s 39B(1)(a) of the DDA is within the ambit of the phrase 'any proceedings against any person for an offence against this Act' (ie the DDA). In our view, the answer must be in the affirmative. Thus, under s 36 of the DDA, it is clear that it shall not be necessary for the prosecution to negative by evidence any licence, authorisation, *authority*, or other matter of exception or defence, and the burden of proving any such matter shall be on the person seeking to avail himself thereof. So, in the context of s 2 of the DDA, it is not necessary for the prosecution to negative by evidence the absence of *authority* under the DDA or the regulation made under the Act, and the burden of proving *authority* under the DDA or the regulations made under the Act is on the accused.

[30] We turn to s 37(da). Section 37(da) of the DDA provides:

> 37 Presumptions
>
> In all proceedings under this Act or any regulation made thereunder —
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (da) any person who *is found* in possession of —
>
> (i) ...
>
> (ii) ...
>
> (iii) ...
>
> (iv) 200 grammes or more in weight of cannabis;
>
> (v) ...
>
> *otherwise than in accordance with the authority of this Act* or any other written law, *shall be presumed*, until the contrary is proved, *to be trafficking in the said drug*;

[31] In the context of the offence of trafficking, s 37(da) cannot exist on its own. It must be read with s 39B of the DDA which provides the provision for the creation and punishment of the offence of trafficking in dangerous drugs. In this regard, in *Public Prosecutor v Abdul Rahim bin Kalandari Mustan* [2008] 6 MLJ 161; [2008] 5 CLJ 108, this court held:

A ... that for the offence of trafficking to be punishable as provided the Act prescribes certain prerequisites, namely:

(i) that an accused has to be found in possession which include knowing the nature of the thing possessed, a vital element for the ingredient of possession;

B

(ii) that the quantity of drug found in possession must at least meet the statutory minimum amount specified depending on the nature of the drug found in possession; and

(iii) that the possession is otherwise than in accordance with the authority of the Act or any other written law.

C

Obviously, the aforesaid prerequisites must be with regard to the provision under s 37(da). As for prerequisites (i) and (ii), there must be an express finding of possession as understood in criminal law based on evidence. The burden is on the prosecution to adduce sufficient evidence to establish the two prerequisites to trigger the presumption under s 37(da). As for prerequisite (iii), as in the case of s 2 of the DDA which we have dealt with, this is where the statutory exception under s 36 of the DDA is applicable. We have also held that prosecution for an offence of trafficking under s 39B(1)(a) of the DDA is within the ambit of the phrase 'any proceedings against any person for an offence against this Act (ie the DDA)'. Thus, pursuant to s 36 of the DDA, it shall not be necessary for the prosecution to negative by evidence the absence of authority of the DDA or any other written law, and the burden of proving 'in accordance with the authority of this Act or any other written law' is on the accused (ie Jazlie in the present case).

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[32] Hence, in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, the leading case on the use of the presumption under s 37(da), Chong Siew Fai CJ (Sabah and Sarawak) delivering the judgment of this court held at p 289 that:

G

... to arrive at the presumption of 'trafficking' under s 37(da), *a finding of being 'in possession' of the drug is necessary (in addition, of course, proof of the relevant minimum quantity specified)*.

H

...

In our view, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, *there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence*.

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[33] Further at p 292, His Lordship said:

We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of the

dangerous drug reaches or exceeds the quantity specified in s 37(da), there is nothing to prevent a trial court from coming to a *factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s 37(da) which, of course, is rebuttable.*

[34] The aforesaid statements were referred to and held to be correct by Abdul Malek Ahmad PCA in his judgment in *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685 at p 708; [2005] 1 CLJ 713 at p 744:

As for s 37(da) of the Act, it does not start with 'any person who is deemed in possession' shall be presumed to be trafficking, in which case it will be considered a consequence of s 37(d) of the Act. *Instead, the word 'found' is inserted and so there must be a finding of possession first before the presumption of trafficking comes about*. It is, therefore, my considered opinion that the decision in *Muhammed bin Hassan* is correct.

[35] The aforesaid statements at p 292 were referred to by this court in *Public Prosecutor v Abdul Rahim bin Kalandari Mustan* where Richard Malanjum CJ (Sabah and Sarawak) as he then was said:

Indeed on closer reading of what was stated by this court in *Muhammed bin Hassan it is clear that if the presumption of trafficking is to be invoked there must first be a factual finding of possession. The following statement supports this conclusion: 'where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s 37(da)* which, of course, is rebuttable.

[36] Thus, it is clear that what is necessary to arrive at the presumption of 'trafficking' under s 37(da) in addition to proof of the relevant minimum weight of the dangerous drugs specified, is a finding of being 'in possession' of the dangerous drugs (and we must add, *not* a finding of being 'in possession otherwise than in accordance with the authority of the DDA or any other written law'. The reason is obvious. By virtue of s 36 of the DDA it is not necessary for the prosecution to prove the element stated in the phrase in the italics.

[37] For reasons we have given, we hold that the learned judge of the High Court did not err in invoking the presumption under s 37(da) of the DDA in respect of both the charges. We find no misdirection or appealable error on the part of the learned judge of the High Court. Having carefully scrutinised the evidence on record and having carefully examined the judgment of the learned judge of the High Court, we are satisfied that the conviction and sentence on Jazlie on both charges are safe. In the result, Jazlie's appeals are dismissed, and the conviction and sentence imposed on him by the High Court are affirmed.

A *Appeal unanimously dismissed; conviction and sentence affirmed.*

Reported by Ashok Kumar

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